1		Honorable John Bridges
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7 8		WASHINGTON Y SUPERIOR COURT
9	TIMOTHY BORDERS, et al.,	NO. 05-2-00027-3
10	Petitioners,	SECRETARY OF STATE'S
11	v.	RESPONSE TO WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION IN LIMINE
12	KING COUNTY, et al.,	TO EXCLUDE EVIDENCE OF PETITIONERS' ERRONEOUSLY
13	Respondents.	LISTED "ILLEGAL CONVICTED FELON VOTERS"
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15	COMES NOW Respondent, Sam	Reed, as Secretary of State of the State of
16	Washington ("Secretary Reed" or "the Secre	etary"), by and through the undersigned counsel,
17	and responds as follows to the Washington S	State Democratic Central Committee's Motion in
18	Limine to Exclude Evidence of Petitioners	s' Erroneously Listed "Illegal Convicted Felon
19 20	Voters" ("Motion"). <sup>1</sup>	
20	By this motion, Intervenors ask this	S Court to exclude evidence of allegedly illegal
$\begin{bmatrix} 21 \\ 22 \end{bmatrix}$	votes cast by convicted felons:	
23		nd convincing evidence that each person judicated as a juvenile; (2) was convicted
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<ul><li>25</li><li>26</li></ul>		ate with those raised by the Petitioners' Motion to Clarify ary respectfully suggests that the Court should consider these
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of a felony (i.e., was not convicted of a misdemeanor or gross misdemeanor); (3) was not given a deferred sentence; (4) has not been discharged pursuant to RCW 9.94A.637; (5) cast a ballot in the 2004 General Election; and (6) marked that ballot to indicate a vote for a gubernatorial candidate.

Motion at 18-19. As indicated below, Secretary Reed concurs with much of the legal analysis offered in Intervenors' Motion, and with limited qualifications, submits that the Intervenors have set forth the proper standards to be applied in determining whether a voter in the gubernatorial election was a disqualified felon. But the relief requested is inappropriate for a motion in limine to the extent the Intervenors presently do not seek to exclude evidence of specific voters who are alleged to have been disqualified felons. Absent such a pretrial challenge, the court must first hear and consider the evidence, and then determine whether it is sufficient to establish the alleged disqualification.

The state constitution provides, in pertinent part, that, "All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise." Const. art. VI, § 3. Accordingly, there are two elements involved in proving that a vote was cast illegally due to a felony conviction: (1) the voter must have been convicted of an infamous crime;<sup>2</sup> and (2) the voter's civil rights must not have been restored. *Id.* These constitutionally established elements support much of Intervenor's legal analysis as to what must be proven to establish that a vote is illegal for reason of felony conviction.

Intervenors correctly point out that in order for a conviction to disenfranchise an otherwise qualified voter, that conviction must be an adult felony conviction, and not a juvenile adjudication. Motion at 8-11. Similarly, the conviction must be for a felony, and not for a misdemeanor or gross misdemeanor. *Id.* at 12-13.

<sup>&</sup>lt;sup>2</sup> "Infamous crime" is defined for this purpose as meaning, "a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility." RCW 29A.04.079.

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Petitioners also bear the burden of proving that a particular voter is a convicted felon whose civil rights have not been restored.<sup>3</sup> However, Intervenors identify only one of multiple ways in which the civil rights of a convicted felon may be restored. There are five ways in which the civil rights of a convicted felon can be restored:

- The sentencing court may issue a certificate of discharge pursuant to RCW 9.94A.637;
- The sentencing court may enter an order restoring civil rights upon termination of a suspended sentence under RCW 9.92.066;
- The Indeterminate Sentence Review Board may enter a final order of discharge of an offender under its jurisdiction, as provided in RCW 9.96.050;
- The Governor may issue a pardon, which has the effect of restoring civil rights, as provided in RCW 9.96.020; or
- The Clemency and Pardons Board may issue a certificate restoring the right to vote—but not civil rights more generally—to any offender convicted of a felony in federal court in any out-of-state court, as provided in RCW 9.94A.885(2).

Intervenors also ask the Court to exclude evidence of allegedly illegal votes cast by felons unless Petitioners can prove that each such person actually cast a ballot at the 2004 general election and marked a vote for a candidate for governor on that ballot. Motion at 17-18. As stated in the Secretary's response to another motion<sup>4</sup>, the evidence that a particular person voted should be based upon the poll books and ballot envelopes as the best available evidence. The fact that a voter may have been "credited" with voting is not sufficiently reliable as evidence that a ballot was actually cast. As for proof that the voter cast a vote in the

<sup>&</sup>lt;sup>3</sup> See Secretary of State's Response to Petitioners' Motion to Clarify Burden of Proof Regarding Illegal Votes.

<sup>&</sup>lt;sup>4</sup> See Secretary of State's Response to Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting.

1	Governor's race, Intervenors' contention in this regard interrelates with the determination of
2	the Petitioner's over all burden of proof. As indicated in the Secretary's response to another
3	pending motion, Petitioners are required to prove that any illegal votes and/or election official
4	misconduct changed the outcome of the election. <sup>5</sup> RCW 29A.68.070, .110. This would
5	necessarily involve showing, at least in the aggregate, that any illegal votes changed the
6	outcome. Circumstantial evidence that is otherwise admissible may be offered on this point.
7	Intervenor's motion for an order excluding evidence is premature to the extent it is
8	based only on a generalized assertion that certain evidence would be insufficient to prove an
9	illegal vote based on felon disenfranchisement. Nonetheless, with the exception noted above,
10	the Intervenors have identified the elements necessary to be proven in order to establish an
11	illegal felon vote, and entry of an order to that effect would properly streamline trial.
12	DATED this 20th day of April, 2005.
13	ROB McKENNA
14	Attorney General
15	Maureen Hart, WSBA No. 7831 Solicitor General
16	
17	/s/
18	Jeffrey T. Even, WSBA No. 20367 Assistant Attorney General
19	FOSTER PEPPER & SHEFELMAN PLLC
20	Special Assistant Attorneys General
21	Thomas F. Ahearne, WSBA No. 14844 Hugh D. Spitzer, WSBA No. 5827
22	Marco J. Magnano, WSBA No. 1293
23	Attorneys for Respondent Secretary of State Sam Reed
24	of State Sain Reed
25	<sup>5</sup> See Secretary of State's Response to Washington State Democratic Central Committee's Motion in
26	Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes.